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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1057

INLAND STEEL COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD,
*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.**

CARL MEYER,
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THE BLAKELY-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Inland Steel Company, by Carl Meyer, Frederic Burnham and Herbert A. Friedlich, its attorneys, respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above entitled cause on December 29, 1941, reversing the decree of the United States District Court for the Northern District of Illinois, Eastern Division.

The case involves the claim of respondents, minority stockholders of Inland Steamship Company, a West Virginia corporation (which was an eighty per cent owned sub-

sidiary of petitioner, Inland Steel Company, and whose business consisted entirely of the carriage of petitioner's freight) that, by (i) causing the dissolution of Steamship Company in accordance with the applicable West Virginia statute, (ii) purchasing Steamship Company's assets, three freight steamships, at the dissolution sale for their full fair market value and (iii) thereafter employing said ships to carry cargoes belonging to petitioner, petitioner had fraudulently used its dominant majority position to force the Steamship Company out of a prosperous going business and had appropriated that business to itself, and was therefore liable in damages to the minority stockholders for the going concern value of the minority interest as though said interest had been fraudulently converted by the majority to its own use.

## QUESTIONS PRESENTED.

1. Whether a Circuit Court of Appeals, after having first, in prior litigation between the same interests, affirmed the District Court's refusal to enjoin (a) a proposed dissolution of a prosperous going West Virginia subsidiary pursuant to statute, and (b) the proposed purchase of its physical assets by its parent corporation at the dissolution sale, all of which the minority stockholders of said subsidiary then claimed would result in a fraudulent breach of the trust owed the subsidiary and the minority by the parent corporation, and a fraudulent usurpation of the business of the subsidiary and the minority's interest in it, and after having held, in such prior litigation, that the majority might proceed with the contemplated dissolution and purchase such assets, may then, in a subsequent appeal by the minority from an adverse decree in a case brought against the parent corporation to recover damages because of the very same dissolution, decree that the dissolution, which had been carried out exactly as projected and described

in the injunction bill, and admitted by defendant in its answer thereto, was a breach of trust by the parent corporation and a fraudulent appropriation by it of the business of the company.

2. Whether, under the laws of West Virginia and the statute of that State which permits the owner of sixty per cent of the capital stock of a corporation to dissolve it, it is a breach of trust and a fraud on the minority for a parent corporation, owning the requisite percentage of stock, to dissolve its prosperous going subsidiary against the interests of the minority stockholders thereof and to purchase the assets of said subsidiary at the dissolution sale for the full fair value thereof, and to employ said assets, which have no peculiar value beyond asset value, as instrumentalities of service just as they had theretofore been employed when operated by the subsidiary.

3. Whether the Circuit Court of Appeals, upon reversing a District Court decree which dismissed for want of equity a bill for an accounting, may, in addition to remanding the case with instructions to proceed to the assessment of damages, lay down a rule for the measure of damages which was not an issue before the Circuit Court of Appeals and had not been argued by the parties.

## JURISDICTION.

The decree of the Circuit Court of Appeals was entered December 29, 1941. (Rec. 250.) The petition for rehearing was filed within the time prescribed by the rules of court (Rec. 260), and was overruled on February 17, 1942. (Rec. 305.) Jurisdiction is invoked under Section 240(a), c. 229 of the Act of February 13, 1925, 43 Stat. 936, 28 USCA § 347(a).

## STATUTES INVOLVED.

The West Virginia statute governing voluntary dissolution in effect at the time of the dissolution in this case is § 80, Article I, ch. 31 of the Code of West Virginia on Corporations, West Virginia Code of 1937, Sec. 3092. It is set out at Record, p. 135. The pertinent provisions thereof are as follows:

> "§ 80. Voluntary dissolution. * * *
> The stockholders at any time may resolve to discontinue the business of the corporation, at least sixty per cent of the shares of capital stock entitled to vote being present at the meeting and voting in favor of such discontinuance, and may divide the property and assets among those entitled thereto, after paying all the debts and liabilities of the corporation."

## STATEMENT.

Inland Steamship Company was organized in 1911. (Rec. 79.) Throughout its existence it was merely an instrumentality of Steel Company, exclusively engaged in transporting Steel Company's iron ore, limestone and coal by freight steamships from Steel Company's mines to its mills. (Rec. 192.)

The company was organized under the laws of West Virginia, which at the time of the company's organization and thereafter always permitted the owners of at least sixty per cent of the capital stock to discontinue the business of the company at any time. (Rec. 135, 196.) Steel Company always owned at least sixty per cent of the capital stock, and at the time of dissolution owned eighty per cent thereof. Respondents owned eighteen per cent of the stock.

**Petitioner was under no obligation, prior to dissolution of the Steamship Company, to tender its cargoes to the Steamship Company for carriage as there was no contractual arrangement of any kind between the two companies as to the carriage of Steel Company's freight.** (Rec. 194.)

However, Steel Company had always paid Steamship Company the regular going freight rates. (Rec. 192.) The latter company, accordingly, made large profits and paid large dividends. (Rec. 197.) This redounded solely to the benefit of the minority stockholders. As far as Steel Company was concerned it merely meant that the same percentage of total freight carried as the percentage of the capital stock owned by it was carried at cost, the excess above this cost coming back to it as dividends from its stockholdings. (Rec. 58.)

In 1934 Steel Company determined to carry its freight at cost, either in its own ships, or in those of a wholly owned subsidiary. There were definite reasons for regarding this as advantageous. (Rec. 81, 158, 164.) It also felt that the situation which permitted the minority to receive dividends out of traffic which was wholly produced, owned, managed and controlled by Steel Company was subject to criticism by stockholders of Steel Company. (Rec. 99, 168.) Therefore Steel Company sought to purchase the minority interest for $700 per share, the admitted physical asset value. Being unsuccessful in this, it determined to dissolve the company and, with the proceeds of the dissolution sale, to establish a wholly owned fleet, preferably by the purchase of new ships (two of the then existing fleet being somewhat obsolete), or, if necessary to the protection of its investment, by the purchase of the ships in question. (Rec. 97.) These ships were ordinary lake freighters of which there was at that time a large over-supply. (Rec. 97, 195.)

When Steel Company called a dissolution meeting, respondents filed a bill to enjoin the dissolution. They charged that Steel Company wished to acquire complete ownership of the assets of Steamship Company, and had announced that, if it could not buy the minority interest for $700 per share, it would dissolve the company, purchase the assets, and thereupon continue to operate the ships and business as heretofore; that this would amount

to the perpetration of a fraud on the minority. (Rec. 143-146.)

Steel Company answered, admitting that it intended to dissolve the company, and would bid for the ships an amount sufficient to protect its investment therein (an amount equal to $700 per share of Steamship Company stock), but that if third parties should bid in excess of such amount, it would be willing to permit them to purchase the ships. (Rec. 158.) Besides stating the various reasons which made a wholly owned subsidiary preferable, such as possible mergers and then proposed federal legislation, Steel Company took the position that the freight, which originated with and belonged to it, should properly be transported in its own ships at cost. (Rec. 157.) The testimony was to the same effect. (Rec. 81, 95-97.)

Upon a hearing the District Court dismissed respondents' bill for want of equity and in its findings and conclusions stated that the contemplated dissolution and sale would not result in the perpetration of a fraud upon the minority, that the dissolution should proceed, that all of the company's assets should be sold at public sale for the highest and best price obtainable, and that Steel Company was at liberty to bid for said assets at said sale. (Rec. 169-170.)

Respondents appealed. The Circuit Court of Appeals for the Seventh Circuit affirmed the District Court and laid down the principle that a West Virginia corporation can be dissolved upon vote of sixty per cent of its capital stock "regardless of motive and expediency" (Appendix, p. v); that a court of equity may not interfere with the statutory right of the majority to force dissolution and sale of the assets unless the evidence discloses an unfair advantage over the minority stockholders, (Appendix, p. v); and that the majority may not force a sale to itself at less than the full value (inferentially that the majority may sell to itself at full

value). The opinion stated that the majority might proceed to dissolution (Appendix, p. vi); that the District Court was justified in its conclusion that the circumstances up to that time were not such as to create a cause of action in the minority stockholders, and that the decree should be affirmed, but that the affirmance would be without prejudice to the right of the minority thereafter to present the same facts in connection with such other facts, if any, as would bring about a situation within the doctrine recognizing causes of action in minority stockholders. (Appendix, p. ix.)

Thereupon the dissolution proceeded. The ships were sold to Steel Company, the only bidder, at a widely advertised public sale, for their admitted fair asset value, $1,120,000, and the proceeds of the sale were ratably distributed to the stockholders. (Rec. 208.) Respondents, after accepting and keeping their share, brought a bill to recover damages for alleged fraudulent dissolution and appropriation of Steamship Company's business. The court referred the cause to a Master to report solely on the question of liability to account. (Rec. 37.) He reported that there was no fraud and no liability. (Rec. 202.) The District Court affirmed the Master, with full findings of fact and conclusions of law, and dismissed the bill for want of equity. (Rec. 223.) This second case (the instant case) was heard on the record in the first case, plus evidence of the sale and distribution which is not claimed to have been in any way unfairly held or made, and which were carried out exactly as it was charged in the first complaint they would be carried out, and exactly as it was then admitted they would be carried out.

The minority again appealed to the United States Circuit Court of Appeals for the Seventh Circuit. The appeal was heard by the same judges as before. The Court of Appeals reversed the District Court and held that, although it was legal for Steel Company to bring about a

dissolution of Steamship Company, Steel Company was a trustee for the minority stockholders, and through its officers had been faithless to its trust in purchasing the ships and continuing to use them to carry its own freight; that the dissolution was a mere device by means of which Steel Company appropriated for itself the transportation business of Steamship Company; that Steel Company was liable to respondents for the value of respondents' interest in Steamship Company, less the amount received from the sale of the ships; that said interest was to be measured as of a time prior to dissolution, just as though the company was never to be dissolved but was to continue indefinitely as a prosperous going concern, carrying the freight of Steel Company as it had in the past.

**REASONS FOR ALLOWANCE OF WRIT.**

1. The Circuit Court of Appeals for the Seventh Circuit has rendered a decision in this case in conflict with the decision rendered by the same court and the same judges in former litigation between the same interests on the same matter, viz., an important question of corporation law as to whether a fraud is perpetrated upon the minority stockholders of a West Virginia subsidiary, legally dissolved pursuant to statute, when the parent corporation, which has brought about the dissolution, purchases the assets at the dissolution sale for their full fair value and uses them in the same manner as they had been employed by the subsidiary, it being conceded that said assets have no value beyond mere physical asset value.

The Circuit Court of Appeals in the first appeal refused to enjoin such dissolution and sale, but stated that the dissolution might proceed. After such dissolution and sale had taken place, exactly as the injunction bill had charged was planned, and the answer had admitted would be done, the minority stockholders sued for damages, and

the same Circuit Court of Appeals, in the minority's appeal from the dismissal of their second bill, held that the majority stockholder had defrauded the minority stockholders by purchasing the assets at the dissolution sale for their full fair value, and was liable to the minority stockholders as though their interest had been converted by the majority to its own use. These two decisions are directly conflicting and cannot be reconciled.

2. The Circuit Court of Appeals for the Seventh Circuit has rendered a decision in this case in conflict with the decision rendered by the Circuit Court of Appeals for the First Circuit on the important question of corporation law, viz., whether, in a dissolution brought about by the majority, it can be said to have fraudulently appropriated the business of the dissolved company when it purchased the only saleable assets at the dissolution sale for an admittedly fair price and proceeded to use them in its business.

The Circuit Court of Appeals for the Seventh Circuit in this case has decided that such a purchase is fraudulent. The Circuit Court of Appeals for the First Circuit in the case of *May* v. *Midwest Refining Co.*, 121 Fed. (2d) 431, 438-9 (June 6, 1941) has decided that such a purchase was not fraudulent.

3. The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, the question being whether a parent corporation of a West Virginia subsidiary commits a breach of trust and perpetrates a fraud upon the minority stockholders of such subsidiary, and fraudulently converts to its own use the interest of the minority stockholders in such subsidiary, and fraudulently appropriates the business of such subsidiary, when it causes said subsidiary to be legally dissolved against the interests of said minority stockholders, purchases the physical assets there-

of at the dissolution sale for a fair price, and uses said assets in the parent company's own business.

The Circuit Court of Appeals for the Seventh Circuit in this case has held that since it was detrimental to the interests of the minority stockholders of its subsidiary, Inland Steamship Company, it was a breach of trust and a fraud on the minority for Inland Steel Company, the parent corporation, to vote the dissolution of its West Virginia subsidiary pursuant to the applicable West Virginia statute, and purchase at the dissolution sale, for an admittedly fair price, the ships of Steamship Company, three ordinary Great Lakes freighters of no peculiar value, and to use said ships to carry Steel Company's freight just as they had been used before Steamship Company was dissolved.

In *Tierney* v. *United Pocahontas Coal Co.*, 85 W. Va. 545, 559, 102 S. E. 249, (1920), the Supreme Court of Appeals of West Virginia held that the sale of a corporation's property to the majority was not fraudulent if it was for a fair price and did not prejudice the rights of any interested party.

In West Virginia a stockholder may vote in his own interests even though against the interests of other stockholders. In voting he is not a trustee. *Thurmond* v. *Paragon Colliery*, 82 W. Va. 49, 53, 95 S. E. 816, 817 (1918).

4. The Circuit Court of Appeals for the Seventh Circuit has departed from the accepted and usual course of judicial proceedings in such a way as to call for an exercise of this Court's power of supervision in that it has laid down a rule for the measure of damages in an accounting, although the only question before the court was whether there should be an accounting.

The question before the Circuit Court of Appeals was whether the District Court was right in dismissing for want of equity a bill brought by the minority stockholders of a subsidiary corporation, claiming that they had been dam-

aged because the subsidiary's parent had dissolved it, purchased its assets, and used them in the parent's own business. The Circuit Court of Appeals reversed and remanded the case, but, in doing so, went beyond the issue as to whether defendant was liable to plaintiffs and should account, and laid down the rule of damages to be applied in such accounting, although that was not yet an issue in the District Court or in the Circuit Court of Appeals, and had not been argued in the case.

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It is respectfully submitted that the writ of certiorari herein prayed for should issue for the reasons urged.

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## BRIEF IN SUPPORT OF PETITION.

### OPINIONS BELOW.

The opinion of the Circuit Court of Appeals, for a review of which the petition herein is filed, appears on page 250 of the record. It is not yet reported. The previous opinion of the Circuit Court of Appeals in litigation between the same interests, over the same subject-matter, appears as an appendix to this brief.

### JURISDICTION.

Basis upon which it is contended this court has jurisdiction to review is stated in the petition (*ante*, p. 3).

### QUESTIONS PRESENTED.

The questions presented are stated in the petition (*ante*, p. 2).

### REASONS FOR ALLOWANCE OF WRIT.

The reasons for allowing the writ are stated in the petition (*ante*, p. 8).

### STATEMENT.

A statement of the case is in the petition (*ante*, p. 4).

### STATUTES INVOLVED.

The West Virginia statute involved is referred to and quoted from in the petition (*ante*, p. 4).

## ARGUMENT.

### Point I.

**IN THE FIRST CASE, WHERE THE MINORITY SOUGHT TO ENJOIN THE DISSOLUTION AND SALE, THE AFFIRMANCE BY THE CIRCUIT COURT OF APPEALS OF THE DISTRICT COURT DECREE WHICH DISMISSED THE MINORITY'S BILL ON THE GROUND THAT THE PROPOSED DISSOLUTION, SALE AND PURCHASE WERE NOT FRAUDULENT WAS NECESSARILY A HOLDING THAT SUCH PROPOSED ACTION WAS NOT FRAUDULENT, WHICH IS DIRECTLY IN CONFLICT WITH THE SAME COURT'S DECISION IN THE MINORITY'S SUBSEQUENT DAMAGE SUIT WHICH HOLDS THAT THE SALE AND PURCHASE MADE EXACTLY AS CHARGED IN THE FIRST CASE WERE FRAUDULENT.**

The conflict is between the decisions in *Lebold, et al.* v. *Inland Steamship Company*, 82 Fed. (2d) 351 (Appendix to this petition), and *Lebold, et al.* v. *Inland Steel Company*, a subsequent phase of the same controversy. (The instant case, not yet reported, but found at Rec. p. 250.) In the first opinion the Circuit Court of Appeals necessarily decided that the contemplated dissolution and sale were not fraudulent or improper. In the second opinion the same court held that the dissolution and sale, which were carried out exactly as the first case charged they would be, was fraudulent and improper.

When a meeting was called to dissolve Steamship Company, the minority filed a bill to enjoin the dissolution charging that Steel Company intended to acquire complete ownership of the assets of Steamship Company by purchasing them at the dissolution sale, and intended to continue to operate said assets for its own purposes in the same manner that they had been theretofore operated, and that this would amount to a continuance of the business of Steamship Company by Steel Company. (Rec. 143-146.)

In its answer and in its testimony defendant admitted that it intended to purchase the ships, if no one bid an amount higher than their agreed physical asset value (which was very unlikely because of the depression), and that, if purchased, it would employ them to carry the freight of Steel Company as theretofore. (Rec. 158, 55.) The District Court dismissed the bill for want of equity and specifically held that the contemplated dissolution and sale was not fraudulent or improper and that Steel Company might bid for the ships at the sale. (Rec. 168-170.) Upon appeal the Circuit Court of Appeals affirmed the lower court in its dismissal of respondents' bill for want of equity, but held that the affirmance would be without prejudice to a subsequent presentation of the same facts in connection with *such further facts*, if any, as might bring about a situation within the doctrine recognizing causes of action in minority stockholders. (Appendix, p. ix.) It held that the majority might proceed to a dissolution but that what would happen then or thereafter was not then before the court and could not then be made the basis for a finding of fraud. It held that the bill was premature and that the court below rightfully held that the evidence did not make out a case within the legal principles which it had outlined in its opinion. (Appendix, p. vi.)

Respondents would undoubtedly concede that if the court had affirmed the District Court without qualification, such affirmance would necessarily have amounted to a holding that the contemplated dissolution sale and purchase was not a fraud upon the minority, a holding directly at variance from that now announced by it. It is merely because the court attempted to qualify its affirmance, as noted above, that respondents contend that the two decisions are not in conflict. We respectfully submit that the conflict cannot be thus avoided. The injunction sought to enjoin an alleged threatened fraud. The injunction suit sought to prevent not only the dissolution but also the

sale of the ships, their purchase by Inland Steel Company, and their use by that company for the purpose of carrying its own freight. This is disclosed not only by the bill and its prayer, but by the terms of the temporary restraining order obtained without notice. (Rec. 145, 146, 148.) The parties and the court knew that if there was a dissolution there would necessarily be a sale. They knew that the depression had so affected the steel industry that there was no market for lake freighters and that Steel Company would undoubtedly be the purchaser. (Rec. 194-5, 55.)

It is undeniably true that if the course which Steel Company admitted it intended to pursue was fraudulent, the court had clear jurisdiction to enjoin it. As this court has said in *Swift and Company* v. *U. S.*, 276 U. S. 311, 326:

> "* * * a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and * * * an injunction may issue to prevent future wrong, although no right has yet been violated."

See also, *Carter* v. *Carter Coal Co.*, 298 U. S. 281, 287-288; *Pierce* v. *Society of the Sisters*, 268 U. S. 510, 536; *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 592-593; and *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82.

The Circuit Court of Appeals (on the record having no choice but to believe that defendant intended to do what it said it was going to do) would necessarily have reversed the lower court and ordered the injunction to issue if it had been of opinion that such actions would be fraudulent or improper.

A dismissal "without prejudice" does not permit the relitigation of issues then before the court. *State of Missouri* v. *Chicago, Burlington & Quincy R. R.*, 241 U. S. 533, 539; *Arkadelphia Co.* v. *St. Louis Southwest Ry. Co.*, 249 U. S. 134, 147; *Window Glass Machine Co.* v. *New Bethlehem Window Glass Co.*, 264 Fed. 822 (3 C. C. A.);

*Window Glass Mach. Co.* v. *New Bethlehem Window Glass Co.*, 269 Fed. 979 (3 C. C. A.).

The plan to dissolve the corporation and to buy the ships was the plan that was under attack in the first case. The affirmance by the lower court placed its stamp of approval upon that plan and removed it from further inquiry. The ruling by the Circuit Court of Appeals that its affirmance of the lower court's decree would be regarded as without prejudice, left open to plaintiffs only the right to attack fraud if any that occurred subsequent to the dissolution in a sale different from that proposed, as, for instance, a sale for an inadequate price, or an inequitable distribution of the proceeds of the sale. It is highly significant to note that in the extensive *obiter dicta* indulged in by the Circuit Court of Appeals in its first opinion, after deciding to affirm the lower court, it did not indicate that if the dissolution and sale were carried out as proposed, it would hold the same to be a fraud. The court could have said that very easily and plainly had it meant it. On the contrary, after having ruled that a holder of 60% of the capital stock has a right to dissolve a corporation regardless of motive or expedience (Appendix, p. v, l. 8) and, inferentially, that a sale by the majority to itself at full value would be proper (Appendix, p. v, l. 30) it merely indicated *obiter* a fear that the majority would "force dissolution and liquidation of assets and thus produce an opportunity to purchase at a satisfactorily low market price all the physical assets." (Appendix, p. viii.)

## II.

**THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS HELD THAT IT IS A FRAUD ON THE MINORITY FOR A PARENT COMPANY TO PURCHASE THE ASSETS OF ITS SUBSIDIARY, AT THE DISSOLUTION SALE, FOR A FULL FAIR PRICE. THIS IS CONTRARY TO THE HOLDING OF THE CIRCUIT COURT OF APPEALS IN THE FIRST CIRCUIT IN A SIMILAR SITUATION.**

It is very important to note:

1. Steamship subsidiary had always been merely an instrumentality of Steel Company, used by the parent corporation to transport its ore, limestone and coal. (Rec. 192.)

2. No peculiar value inhered in the ships. They were ordinary Great Lakes freight carriers, of which there was an over-supply and for which there was no demand because of the depression in the steel trade. (Rec. 193, 195.)

3. The price paid for these ships at the dissolution sale was a full fair price. (Rec. 208.)

4. It was stipulated that there was no contractual arrangement of any kind that made it necessary for Steel Company to continue to use the services of Steamship Company and therefore its relationship to Steel Company created no transferable intangible asset of value. (Rec. 194.)

This was not the kind of a case which, as the Court seems to have thought (Rec. 258) would have been presented if Henry Ford dissolved the Ford Company and attempted to settle with his minority stockholders on a physical asset basis. Such a transaction would have been improper for the reason that there is more to the Ford Company than physical assets. It has good will, valuable patent rights, established custom and valuable outlets protected by contract. The case decided by the Court was analogous to a situa-

tion where the Ford Company owning eighty per cent of the stock of a subsidiary auto-truck company that did its hauling *without a contract* in a fleet of Ford motor trucks, dissolved the subsidiary and bought the trucks at the dissolution sale for a fair price, and used them thereafter for its own hauling.

It is clear that the Circuit Court of Appeals has held that Steel Company defrauded the minority merely because it purchased the ships at the dissolution sale. Under the opinion Steel Company would not have been held to have done any wrong (a) if the ships had been sold to third parties; (b) if the ships had been sold to third parties and Steel Company had thereupon purchased other ships to carry its own property; (c) if Steel Company had purchased the ships, but had used them to haul the freight of other persons, and had bought additional ships to haul its own freight; or (d) if a third party had purchased the ships and Steel Company thereupon had purchased them from such third party, and used them to haul its freight. In each instance Steamship Company in liquidation would have received no greater price for the ships than it did in fact receive, and would have received nothing for its "business" because it had no "business" to transfer.

If it was right for the Steel Company to buy the ships, it certainly could not have been wrong for it to use them to transport its own property which it was not obligated to permit anyone else to transport. Therefore, no matter how the situation is viewed, the alleged wrong consisted only of the purchase of the ships by the parent company at the dissolution sale.

In *May* v. *Midwest Refining Co., et al.* (C. C. A. 1st, June 6, 1941), 121 Fed. (2d) 431, 439, Standard Oil Company acquired a substantial majority of the stock of Midwest Refining Co., a Maine corporation, the statutes of which State permitted majority stockholders to liquidate the corporation over the protest of a minority, just as do

the statutes of West Virginia. Standard Oil Company voted to purchase the properties for itself. The court held that even though Standard Oil Company might be regarded as a trustee by reason of its alleged domination and control over Midwest Refining Co., nevertheless it had a right to purchase the assets of its subsidiary for a fair price, although the transaction called for rigorous scrutiny because of the relationship of the two companies. It cited *Pepper* v. *Litton*, 308 U. S. 295, 306; 60 S. Ct. 238, in support of its ruling.

## III.

**IT IS IN CONFLICT WITH LOCAL WEST VIRGINIA DECISIONS FOR THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT TO HOLD THAT WHEN A MAJORITY STOCKHOLDER OF A SOLVENT PROSPEROUS WEST VIRGINIA SUBSIDIARY VOTES IN ITS OWN INTEREST AND AGAINST THE INTERESTS OF THE MINORITY STOCKHOLDERS OF SUCH SUBSIDIARY, TO DISSOLVE IT AND PURCHASE SUCH SUBSIDIARY'S PHYSICAL ASSETS AT THE DISSOLUTION SALE, THE MAJORITY STOCKHOLDER COMMITS A BREACH OF TRUST AND A FRAUD ON SUCH MINORITY STOCKHOLDERS.**

It is clear that if a parent corporation's purchase of its solvent subsidiary's assets for a fair price at a legal dissolution sale, and their use in the parent corporation's business is to be regarded as a fraudulent usurpation, reorganizations are at the mercy of a protesting minority, which is a reversion to the doctrine of the common law long since discarded or abrogated by statutes such as that of West Virginia. The question is of especial importance when, as here, and as is very frequently the case, the subsidiary is merely an instrumentality in the service of the parent corporation and the parent corporation is not only the natural purchaser, but the only available one. The decision of the Circuit Court of Appeals in the instant case is in conflict with the West Virginia case of *Tierney* v. *United Pocahontas Coal Co.*,

85 W. Va. 545, 559, 102 S. E. 249, 255 (1920), where the majority forced the sale of the property of its subsidiary to itself, and the court said:

> "If such a transaction is entirely fair, and prejudices the rights of no interested party, there is no reason why it should not be upheld, as well as such a sale to an entirely disinterested party, and it may be said in passing that a reasonable test to be made of the fairness of such a sale is: Would the proposition from one disconnected with the whole affair have been accepted by those acting for the selling company?"

The Circuit Court of Appeals has held that a majority stockholder commits a breach of trust when it votes in its own interest and against the interest of the minority. (Rec. 253.)

It is of controlling importance to notice that it is the stockholders and not the directors who vote on the question of the dissolution of a West Virginia corporation. Steel Company voted the dissolution through its duly authorized representatives. (Rec. 172.) The directors of Steamship Company had no vote.

For reasons valid, but immaterial, since the majority may accomplish dissolution of a West Virginia corporation regardless of motive or expediency (Appendix, p. v), Steel Company wished to carry its iron ore, limestone and coal in its own ships instead of in those of a subsidiary. One way to accomplish this was to dissolve the subsidiary and purchase the ships at a fair sale. The other way was to buy other ships and leave the subsidiary with its ships. In the latter case, as respondents have stipulated, there would have been no freight for Steamship Company to carry. (Rec. 196, par. 23.) In either case the minority stockholders would cease to receive the large profits which they had been enjoying solely out of the carriage of Steel Company's freight. It is respectfully submitted that Steel Company was not bound to use

Steamship Company as its freight carrier forever and could vote in its own interest to dissolve its subsidiary in spite of the fact that this was detrimental to the minority stockholders. The Circuit Court of Appeals has held that it could not carry out its dissolution plan because a vote by a majority stockholder detrimental to the interests of the minority stockholders constitutes a breach of trust. (Rec. 253.) We submit that such holding is contrary to the holding of the Supreme Court of West Virginia in *Thurmond* v. *Paragon Colliery Co.*, 82 W. Va. 49, 53, 95 S. E. 816, 817 (1918), where the court, in speaking of the vote of stockholders, as distinguished from those of directors, said:

> "The reason for denying to a director of a corporation the right to vote on a matter in which he is otherwise interested, than as a stockholder in the corporation, is because of the fiduciary or trust relation he bears toward it. 4 Thompson on Corporations, Sec. 4467. But that reason does not apply to a stockholder, and he is not denied his right to vote on any matter properly coming before a stockholders' meeting on account of any private interest he may have which is detrimental to the corporation. 4 Thompson on Corp., Sec. 4467; *Shaw* v. *Davis*, 78 Md. 308, 28 Atl. 619, 23 L. R. A. 294; *Windmuller* v. *Standard Distilling & Distributing Co.* (C. C.) 114 Fed. 491. In *Gamble* v. *Queens County Water Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527, it was held:
>
> > 'A shareholder has a legal right, at a meeting of the shareholders, to vote upon a measure even though he has a personal interest therein separate from other stockholders. In such a meeting each shareholder represents himself and his own interests solely, and he in no sense acts as a trustee or representative of others.' "

The Circuit Court of Appeals has cited *Pepper* v. *Litton*, 308 U. S. 295, 306; 60 S. Ct. 238, to demonstrate (a) that a parent corporation, dominant stockholder in its subsidiary,

is a fiduciary when it assumes control, a principle which petitioner is not controverting, and (b) that *in spite of the West Virginia Statute* it is *ipso facto* a breach of trust for such parent corporation to vote for the dissolution of its subsidiary against the interests of the minority stockholders thereof and to purchase the subsidiary's physical assets for a full fair price and use them in its business, a holding which we respectfully submit *Pepper* v. *Litton* does not stand for in any sense.

## IV.

**THE QUESTION OF LIABILITY TO ACCOUNT WAS THE ONLY QUESTION BEFORE THE CIRCUIT COURT OF APPEALS, BUT IN REVERSING THE CASE IT WENT BEYOND THAT QUESTION AND LAID DOWN A RULE OF DAMAGES, ALTHOUGH THE QUESTION OF THE MEASURE OF DAMAGES, IF THERE WAS LIABILITY, HAD NEVER BEEN ARGUED.**

The case had been referred to a Master "solely upon the issue as to whether or not plaintiffs are entitled to an accounting from defendant". (Rec. 37.) The Master stated they were not so entitled. The District Court affirmed the Master. Now, in reversing the District Court, the Circuit Court of Appeals has held the defendant liable to account to plaintiffs, and has laid down the rule of damages which should be applied to that accounting, and has even roughly sketched out the maximum and minimum amounts of damages which it announces plaintiffs are entitled to recover. In the injunction suit respondents (plaintiffs) introduced evidence as to the value of their stock, to demonstrate that the $700 per share offered by Steel Company for it was not "going concern" value. Defendant introduced countervailing testimony to show that the absence of contractual relations between the two companies and the dissolution removed "going concern" value from consideration, but nowhere was the issue raised as to what the measure of damages would be in the event

an accounting was ordered. Regardless of this, the Circuit Court of Appeals has held that the Steel Company had a right to dissolve the Steamship Company, but that when it did so, and purchased the ships for their full fair value instead of letting them disintegrate at the dock for want of a purchaser, it became liable in damages to the minority just as though it had converted the minority's interest to its own use; that it became liable to pay in one lump sum the capitalized value of the earnings of the company, that is to say, the same amount which the minority would have received over an indefinite period of years as dividends if the Steamship Company had not been dissolved and was not going to be dissolved, but was going to continue in business until the expiration of its charter. We respectfully submit that defendant was entitled to be heard on the question of the correctness of this drastic rule of damages announced for the first time in the court's opinion, and that the court, in deciding that question without a hearing, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

---

Petitioner respectfully submit that the writ of certiorari should issue.

Respectfully submitted,

CARL MEYER,
FREDERIC BURNHAM,
HERBERT A. FRIEDLICH,
*Attorneys for Petitioner.*

## APPENDIX.

IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

**No. 5694.** **October Term, 1935, January Session, 1936.**

Foreman M. Lebold and Samuel N. Lebold,
*Appellants,*
*vs.*
Inland Steamship Company, a corporation,
*Appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

**March 18, 1936.**

Before EVANS and SPARKS, *Circuit Judges,* and LINDLEY, *District Judge.*

LINDLEY, *District Judge.*

Appellants, minority stockholders of appellee, brought this suit to enjoin appellee from taking any steps to dissolve or to discontinue its corporate existence or any other action tending to interfere with the usual operation of its business. Appellants claimed that the acts of appellee, its directors and its majority stockholder, the Inland Steel Company, were such as wrongfully to coerce appellants and to bring about legal injury to them as minority stockholders. Appellee filed its answer, and, upon hearing, the Court dismissed the bill for want of equity. This appeal followed.

Appellee, incorporated in 1911, having an outstanding capital stock of 1,600 shares, each of the par value of $100,

owns and operates three steamships on the Great Lakes. Prior to May, 1935, the Inland Steel Company owned 67.5 per cent. of appellee's stock, and since that time has owned 80 per cent. thereof. Appellants own 295 shares, formerly held by their father, one of the original incorporators. P. D. Block is president and C. B. Randall the Vice-President of both appellee and the Steel Company. L. E. Block is chairman of the board of the Steel Company. L. E. Block, P. D. Block, C. B. Randall, and one of appellants comprise appellee's board of directors. A former additional director resigned when he sold his stock to the Steel Company. Thus three of appellee's executive officers and four directors are likewise executive officers and directors of its majority stockholder, the Steel Company.

Appellee's business is derived almost entirely from the Steel Company, for which it carries ore, coal, and stone. For several years preceding 1935, dividends of $150.00 per share were earned and paid, over and above all deductions for interest, depreciation, bond amortization, and other charges. The average earnings, for the years from 1925 to 1934, were $134.00 per share and the average dividends $103.00 per share. If we could capitalize the earnings upon the basis of a 6 per cent. return, the value of the shares during those nine years would have been over $2000. Upon a capitalization of the dividends upon the same basis, the value would be over $1700 per share. The net earnings have increased as the bonded indebtedness, now $220,000.00, has been reduced, and for the year 1935, up to the time of the trial, equaled those in the preceding year. There was no express contract between the two companies, but the tonnage was carried by original arrangement, succeeded by tacit understanding, at the going or market rates, which are not governed by statute but are the result of competition.

On December 21, 1934, at the annual stockholders' meeting, the subject of minority holdings for the first time was presented, when P. D. Block announced that the Steel Company had had in mind for some time the purchase of such interests. He appointed Randall and McGean, an officer of the Pioneer Company, which likewise carried freight for the Steel Company, as a committee "to fix the value" of appellee's ships. Appellant F. M. Lebold, learning in the following January of the Steel Company's desire to acquire the minority stock, called upon Block, and was told that the committee had been appointed. In March

Randall discussed with the other appellant the purchase of minority interests, saying that in arriving at a valuation earnings could not be considered; that, if the Steel Company should put the ships to hauling coal, they would earn nothing; that, if appellee should meet the lower rates being quoted by some companies, it would earn nothing; but he said, further, that the Pioneer Company had not been required to meet such lower rates.

On May 14, 1935, the committee appointed for the purpose of fixing the value of the ships submitted its report, stating that the Steel Company had said it was unwilling to continue placing traffic with appellee on the then prevailing terms, and that the committee had been appointed to consider the proposal of the steel company "to buy the minority stock" and recommending that such stock be "offered at the price of $700.00 per share." It did not report on the value of the ships. It developed that the price recommended had, in fact, been fixed by Randall, who occupied the dual position in the two companies previously mentioned. Block stated that the desire to buy was based upon possible merger of the Steel Company with others, the possibility of enactment of a law discriminating against companies not owning their own vessels, and the fact that other shippers were transporting their freight for less money. It was not shown at any time, however, that lower rates had been actually available to the Steel Company. Randall candidly stated that, if minority stockholders did not sell at $700.00, the Steel Company, as majority stockholder, would undertake to dissolve appellee, sell its ships, and distribute the proceeds. He testified that the Steel Company would pay no more than necessary, that it would bid enough to realize $700.00 per share, but that, if a better bid should be made, it would be accepted.

Appellants said that they preferred not to sell; that they objected to selling at $700.00 per share; but that they would not refuse to sell at a fair price. Block and Randall, representing the Steel Company, refused to make any further offer or to arbitrate the value of appellants' stock. Appellants called Randall's attention to the fact that he and Block were officers of both companies, and Randall replied that, when he dealt with traffic problems, he had at heart the interests of the Steel Company, and that, in his opinion, the Steel Company had been "suckers" and had acted foolishly in permitting the minority to continue to participate in the profits.

Following appellants' refusal to accept the offer and refusal of the Steel Company to arbitrate, notice was given of a special meeting of appellee's board of directors on July 23, 1935, to act upon a resolution to pay a liquidating dividend from the liquid assets, and of a special meeting of the stockholders to consider the proposed dissolution. Thereupon appellants filed this suit to restrain the action contemplated, and a restraining order was entered. The meetings were held, but no definite action was taken. Block advised appellants that he did not see how appellants could gain anything by their action, because, if they won, there was nothing to prevent the Steel Company from placing its tonnage elsewhere. Randall testified that the motive actuating the Steel Company was the desire to avoid continuing paying dividends to the minority. He designated such payments as pouring "a golden stream to the minority stockholders." This, he said, "disturbed him and was unfair to the Steel Company." Admitting that the Steel Company received the greater part of the dividends, he said, "I have my eye on the part that we do not get," and that, since appellants had declined the offer of $700.00 per share, he had made up his mind definitely that no more traffic would be given to appellee; that this action would result in loss by appellee, which in turn would force dissolution and liquidation. He said these statements were not made in order to coerce appellants, but to advise them of what he had in mind, and that the purpose of the Steel Company was to produce economy in transportation expense by chartering ships at a flat rate, or procuring lower rates from other carriers, or purchasing its own ships, thus assuring to itself all profits resulting from transportation. He had made no computations, however, upon any of these bases, but said that there was a surplus of ships upon the Great Lakes.

The district judge stated the law as being that, in the absence of actual fraud, a statutory percentage of stockholders may dissolve a corporation regardless of motive; that the stockholders of the Steel Company would have been justified in insisting that the situation be terminated; that the contemplated action would not effectuate a fraud upon the minority stockholders, but would bring about a pro rata distribution of assets. Pointing out that 20 per cent. of the money earned by the transportation of the Steel Company's freight was going to minority stockholders, he held that the action of the Steel Company was for its best interests; that its declared conclusion to terminate its

traffic relations with appellee had been reached in good faith; that, in fixing the value of stock, the past earning record could not be considered; that the offer was fair; that, if it should be assumed that the Steel Company did intend to terminate its traffic arrangement with appellee, it would be to the best interests of all stockholders to dissolve the company.

The parties are not greatly in dispute as to the law. A West Virginia corporation can be dissolved upon vote of sixty per cent. of the shares of its capital stock, regardless of motive and expediency. Majority stockholders do not, by mere reason of their holdings, thereby become trustees for the minority stockholders under any and all situations. However, the circumstances may be such that equity will impose upon them the obligations of trustees because of their conduct. In forcing disposition of assets, they may not overreach the minority stockholder and derive benefit from disposition of the assets, to the detriment of the minority stockholder, without being liable for the deprivation thus incurred by the latter. The minority must receive its pro rata share of the common property and the fruits of the capital investment. *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 39 S. Ct. 533, 63 L. Ed. 1099; *Jones* v. *Missouri-Edison Electric Co.* (C. C. A.) 144 F. 765. And if, as a result of action by the majority, the latter reaps a benefit from the assets in which the minority does not share, the latter has its remedy against those thus illegally profiting at its expense, and they may be compelled to make restitution. *Jones* v. *Missouri-Edison Electric Co., supra.* Thus the majority may not force a sale to itself at less than the full value. *Ervin* v. *Oregon Ry. & Nav. Co.* (C. C.), 27 F. 625. Stated otherwise, the action of the majority must be fair to the corporation, and to all stockholders thereof, for the majority becomes in effect the corporation itself and charged with the trust obligations thereof. *Ervin* v. *Oregon Ry. & Nav. Co.* (C. C.) 27 F. 625. The judgment of the majority is not to be interfered with, in the absence of circumstances creating a fiduciary relationship as mentioned or effectuating a fraud upon the minority, but in examining the facts the chancellor must scrutinize them carefully. *Ervin* v. *Oregon Ry. & Nav. Co., supra.* In short, a court of equity may not interfere with the statutory right of the majority to force dissolution and sale of the assets unless the evidence discloses an unfair advantage over the minority stockhold-

ers, with resulting injury to the latter, which they are powerless to prevent.

In the trial court below, the three officers occupying dual positions with the two companies protested their good faith in what was contemplated, presented the reasons back of their action, and disclaimed any intention to benefit at the expense of the minority. They admitted that the step toward dissolution was impelled by their failure to procure the minority stock at the price fixed by themselves, but they insisted such price was fair. It is not contended that they proposed directly to appropriate the minority stockholders' pro rata share of the assets, but it is insisted that the whole project was part of a plan to force liquidation of the physical assets of a going prosperous concern and get rid of the minority stockholders by paying them the proceeds of their share of such assets, but leaving them without any of the fruit of their investment in the way of capitalization of earnings.

It seems to us, in view of all the evidence, that not all the essentials necessary to a complete case on the part of appellants are present. There has as yet been no disposition of the assets or loss to the minority. We cannot say that there will be any such loss. Thus far, the majority, though it has admitted its motive, has done only that which the statute permits it to do, call a meeting for dissolution. This it has a legal right to do. It may proceed to a dissolution, but what will happen then or thereafter is not now before the court, and cannot now be made the basis for a finding of fraud. On the record the bill was premature, and the court below rightfully held that the evidence does not make a case within the principles which we have outlined above.

However, we do not mean to imply that the circumstances that may hereafter develop, taken in connection with what has developed, may not bring appellants within that line of authorities which recognizes a right of action for an unfair advantage taken by a majority. Though the court was justified in holding that the facts thus far do not amount to fraud, it by no means follows that what may develop in the future may not bring about such an injury to appellants as will justify a renewal of their appeal to the chancellor.

The Steamship Company is controlled, and throughout all its existence has been operated and managed, by the majority stockholder, the Steel Company. The directors,

motivated by human instincts, tempted by human impulses, under their own testimony, quite obviously have their first interest in, and make their first devotion to, the dominant company. The Steamship Company is a mere incident to the Steel Company's business, and there devolves upon the latter, therefore, as a result of this relationship, the burden of the utmost of scrupulous fair dealing with the minority of the incidental company. Thus in *Jones* v. *Missouri-Edison Electric Co.* (C. C. A.) 144 F. 765, at page 771, the court said:

> "a majority of the holders of stock owe to the minority the duty to exercise good faith, care, and diligence to make the property of the corporation in their charge produce the largest possible amount, to protect the interests of the holders of the minority of the stock and to secure and deliver to them their just proportion of the income and of the proceeds of the property. Any sale of the corporate property to themselves, any disposition by them of the corporation or of its property to deprive the minority holders of their just share of it or to get gain for themselves at the expense of the holders of the minority of the stock, becomes a breach of duty and of trust which invokes plenary relief from a court of chancery."

The present case illustrates the possible evils arising from interlocking directorates. When, at a stockholders' meeting of the Steamship Company, a majority thereof voted for a dissolution of the corporation, in what capacity were they voting? By what desire were they motivated? The interests of which corporation were they promoting? They certainly were not casting their ballot for promotion of their own interest as stockholders of the Steamship Company, because by their ballot they were voting to put out of business and liquidate in a time of shipping depression a prosperous, going concern which had been paying 150 per cent. dividends upon capital investment, even in years of such depression. No benefit could accrue to the Steamship Company or its stockholders from the liquidation of its physical assets. What, then, was the guiding motive of the majority stockholders? Ordinarily we would say it was the desire to promote their interests as stockholders and directors of the Steel Company by bringing about 100 per cent. ownership of the Steamship Company in the Steel Company and thereby eliminating the minority stockholders and, perhaps, continuing the prosperous business of the Steamship Company.

There was at the stockholders' meeting and at the directors' meeting nobody interested in representing, protecting, or promoting the interests of the Steamship Company other than minority stockholders. Appellee was without that devoted representation to which it is entitled from its directors. It was without directors attempting to protect its corporate business. Clearly, from their own evidence, the majority were representing only the Steel Company.

It was said by the directors, who are also the directors of the Steel Company, that the latter will take away the business of the Steamship Company; but it should be remembered that, if it does so, it will thereby wipe out profits, 80 per cent. of which belongs to it, or, if it becomes the owner of all the assets of the latter, 100 per cent. It is not certain that other boats may be had at cheaper rates. It may be that cutthroat competition has reduced shipping rates, but those paid in preceding years are the prevailing or going rates; any lower rates are less than prevailing market rates; and the Steel Company has not in the past procured the offer of any cheaper rates.

The directors of the Steel Company, who purport to represent also the stockholders of the Steamship Company, say that some of the boats will not draw the full tonnage possible with the new channels. The fact that deeper boats may be employed does not disqualify or put out of business the boats of the Steamship Company. It may make them less efficient in competition with other boats, but there is no showing that the other boats on the lakes, now out of employment, which might be purchased and used, are not equally inefficient.

We would be more favorably impressed by the protestations of good faith of appellee's officers had they in their capacity of representatives of the dominant company shown a willingness to submit to arbitration the value of appellants' minority stock. The majority stockholder may believe that it is entirely fair, but its position renders impartiality difficult, for it is compelled to say, "Let not thy right hand know what thy left hand doth." In view of the frankly admitted desire of the majority to acquire the stock of the minority, its frank confession that the payment of profits to the minority brings only chagrin and dissatisfaction to the majority, the threat that, unless the minority will sell to it at its own price, it will force dissolution and liquidation of assets and thus produce an opportunity to purchase at a satisfactorily low market price

all the physical assets, we confess to some doubt as to eventual results. That degree of fairness required of parties in a dominant situation, or of fiduciary representatives of corporations, or of majority stockholders to the minority, making legal duress impossible, must be present before a court of equity may rest quiescent.

We are of the opinion that the District Court erred in its conclusion that the price of $700.00 was a fair price for the stock of the minority, for the reason that the court concluded as a matter of law that, in determining the value, it should not take into consideration the earning record of the company. The determination of value entails necessarily consideration of all elements that enter into value—cost of physical assets, additions, depreciation and appreciation, market price, earnings, the chances of future successful operation, and prospects of continued earnings. From evidence as to all such elements, true valuation is to be determined. The stocks of many corporations sell for less than their book values, which ordinarily are cost, plus additions and appreciation, less depreciation and obsolescence. On the other hand, the stocks of other corporations sell for many times such value.

In view of our conclusions, it is not now necessary to determine the propriety of the district court's ruling upon the application to make the Steel Company a defendant.

The court was justified in its conclusion that the presently developed circumstances are not such as to create a cause of action in appellants, and the decree, therefore, should be affirmed. But this affirmance and the dismissal by the court below will be without prejudice to the right of appellants hereafter to present the facts herein presented in connection with such further facts, if any, as bring about a situation within the doctrine recognizing causes of action in minority stockholders. With this modification the decree is

AFFIRMED.

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FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

## No. 1057

INLAND STEEL COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD,
*Respondents.*

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

SILAS H. STRAWN,
FRANK H. TOWNER,
ARTHUR D. WELTON, JR.,
*Counsel for Respondents.*

THE BUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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INLAND STEEL COMPANY, A CORPORATION,
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FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD,
*Respondents.*

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## RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*May It Please the Court:*

In 1936 petitioner, completely disregarding the standards and the *caveat* announced by the court below in respondents' first suit,[1] forced the dissolution of Inland Steamship Company, bought its boats, and continued its business as before. Thus frozen out, respondents instituted a second suit,[2] resulting in the decision below.

A reading of these two decisions of the court below will readily demonstrate that there is no conflict between them, and will completely dispose of the petition. For the convenience of the court the second opinion is printed as an appendix to this brief, the first appearing as an appendix

1. *Lebold* v. *Inland Steamship Co.*, 82 Fed. (2d) 451.
2. *Lebold* v. *Inland Steel Company*, 125 Fed. (2d) 369.

to the petition. The conclusions of the second decision were clearly forecast in the first, and are required, not only by the law announced in the first decision but by the overwhelming weight of authority.[3] The grounds urged by the petition are not only apocryphal, but relate largely to a hypothetical record, not to the actual record before the court.

For example, the first suggested hypothesis is that although the court below in the first case *held* that the majority might proceed with the contemplated dissolution and purchase of assets, it has now held petitioner liable to respondents for doing just that. It sounds horrific, but the court below did *not hold* that the majority might proceed. It plainly confessed to doubt as to the outcome of the announced plan, said the petitioner was a trustee, and stated: "We do not mean to imply that the circumstances that may hereafter develop, taken in connection with what has developed, may not bring appellants [respondents here] within that line of authorities which recognizes a right of action for an unfair advantage taken by a majority" (82 Fed. (2d) 451, 455).

A second suggested hypothesis is that at the dissolution sale petitioner paid fair value for the assets of the Steamship Company—the implication being that such payment was for *all* the assets. All that petitioner even pretended to pay for was the tangible physical assets. For these it paid fair value—$1,120,000, the equivalent of $700 per

3. *Pepper* v. *Litton*, 308 U. S. 295, 306; *Southern Pacific Company* v. *Bogert*, 250 U. S. 483, 487, 491; *Jones* v. *Missouri-Edison Electric Co.*, 144 Fed. 765, 771 (C. C. A. 8th); *Wheeler* v. *Abilene Nat. Bank Bldg. Co.*, 159 Fed. 391, 393, 394 (C. C. A. 8th); *Ervin* v. *Oregon Ry. & Nav. Co.*, 27 Fed. 625, 630-632; *Marks* v. *Merrill Paper Co.*, 188 Fed. 850, 854, 855; *In re Doe Run Lead Co.*, 223 S. W. (Mo.) 600, 609, 610; *Morse* v. *Metropolitan etc. Co.*, 100 Atl. (N. J. Eq.), 219, 221 (affirmed at 102 Atl. 524); *Baillie* v. *Columbia Coal Mining Co.*, 136 Pac. (Ore.) 954, 974; *Moore* v. *Lewisburg, etc. Co.*, 93 S. E. (W. Va.) 762, 765; *Major* v. *American Malt Co.*, 181 N. Y. S. 152, 153; *Kavanaugh* v. *Kavanaugh Co.*, 123 N. E. (N. Y.) 148, 151; *Hyams* v. *Calumet & Hecla Mining Co.*, 221 Fed. 529, 543 (C. C. A. 6th); *Farmers Loan & Trust Company* v. *N. Y. & Northern R. R. Co.*, 150 N. Y. 410, 44 N. E. 1043. See also Berle & Means, "The Modern Corporation and Private Property" (page 251).

share. But the court below in the first case had already held that respondent's stock was worth more than $700 per share, which was only another way of saying that *all* the assets were worth more than that figure. Therefore, petitioner's assertion that it paid "full fair value" for the assets of the subsidiary is in the teeth of the holding of the court below in the first case.

A third major hypothetical assumption is that the question of the measure of damages was not an issue before the court below. The District Court made four findings thereon [prepared by petitioner's counsel], numbers 20, 21, 22 and 26 (R. 226, 227), which are assigned as error directly (R. 233, 234) and indirectly (*i. e.*, numbers 42-48, R. 237, 238). Our assignment #51 reads:

> "The court erred in failing to hold that the plaintiffs as minority stockholders are entitled to be paid by the Steel Company the fair value of their stock in the Steamship Company viewed as a going concern, having a demonstrated earning capacity." (R. 238.)

The issue was clearly raised on the appeal. Indeed, the petitioner has swung between two positions—one, that respondents were not damaged (which would have required a negative decision on the proposition just quoted); and the other, that even if there was damage, there was no breach of petitioner's fiduciary obligation, and therefore no remedy. Both points were extensively argued. The case presents a situation where the answer to the question of remedy is found in the answer to the question of damage. The court was undoubtedly right in its conclusion, and in announcing its conclusion, on the question of damage. It is the settled policy of the law that there should be an end of litigation.

With these general considerations in mind, we turn to the statement and the particular points of the petition.

## STATEMENT.

Petitioner's statement is so argumentative and controversial, that the following very short statement is submitted.

In 1935 petitioner, majority stockholder in complete control of its 80% owned subsidiary, Inland Steamship Company, sought to buy from respondents, at $700 per share, their 18% of the subsidiary's stock. In the face of an excellent 24 year earnings and dividend record (the latter averaging $100 per share annually)[4] respondents refused the offer, said they were willing to sell at a fair value, and suggested arbitration. Petitioner said it would not arbitrate with outsiders the price it would pay for something it wished to buy (R. 82, 83).

The subsidiary's business was transportation by water—almost entirely of ore for petitioner. The petitioner threatened respondents that unless they sold their stock to the petitioner at the price of $700 per share set by itself, petitioner would sever traffic relations with the Steamship Company: the latter would then have no business, would be dissolved, and, at the dissolution sale petitioner would buy in the boats and carry on the business.

The record establishes beyond controversy that the dissolution was adopted for the sole *purpose* of eliminating respondents as minority stockholders (R. 82). The sole reason for adopting it was respondent's refusal to sell the stock to the majority at the price fixed by the majority—a price expressly held by the court below in the first case to be less than fair (82 Fed. (2d) 351, 356). The sole

4. For the eleven year period 1925-1935 average annual earnings were just under $200 per share, average annual dividends $116 per share (R. 197).

objective and the sole accomplishment were to eliminate respondents from participation in the common enterprise. Petitioner sought to, and but for the decision of the court below, would have, derived an advantage from disposition of the subsidiary's assets not only at the expense of the respondents but exactly in proportion to that expense.

Prior to the dissolution a vice president both of petitioner and of the Steamship Company said, with respect to the dividends paid the latter's stockholders: "I have got my eye on the part that we do not get" (R. 100); that "it gripes me very much * * * to pour a golden stream to the minority stockholders" (R. 99). After the dissolution he said that "the principal economy in direct operation comes from operating at cost without a profit * * * to the extent that we did not own the stock, the profit did not flow to us. It was *this* profit that did not flow to us that was *the major item of added cost*" (R. 58; italics supplied).

This brief statement, in conjunction with the quite full statements of the facts found in both of the opinions, adequately presents the case. There should, however, be some reference to some of the misstatements in the petition.

At page 3 (in bold face) there is the statement that "petitioner was under no obligation, prior to dissolution of the Steamship Company, to tender its cargoes to the Steamship Company for carriage"—because there was no contractual arrangement of any kind between the two companies as to the carriage of Steel Company's freight. But the court in its first opinion said, as to this question, "There was no express contract between the two companies, but the tonnage was carried by *original arrangement*, succeeded by *tacit understanding*, at the going or market rates, which are not governed by statute but are the result of competition" (82 Fed. (2d) 351, 352).

The soundness of this observation is borne out by the testimony of Mr. Randall who, in speaking of another Steel Company which owned 49% (or 51%) of a transportation company, said: "I know their traffic is *bound* to that fleet because of their ownership" (R. 51). The court below recognized this factor in commenting on petitioner's threat to take its business away from the Steamship Company: "It should be remembered that, if it [petitioner] does so, it will thereby wipe out profits, 80% of which belongs to it, or if it becomes the owner of all the assets of the latter, 100%" (82 Fed. (2d) 351, 355).

At page 5 of the petition it is stated that: "In 1934 Steel Company determined to carry its freight at cost either in its own ships or in those of a wholly-owned subsidiary". According to the testimony of petitioner's witness, the *first* decision was that the Steel Company's traffic could be transported more economically than through the then existing arrangement with the Steamship Company, either by chartering one or more steamers, by seeking lower rates from other carriers, or by buying other boats and setting up an Inland Steel fleet (R. 96). The real decision was to eliminate the minority.

It is said on page 7 of the petition that the sale and distribution "is not claimed to have been in any way unfairly held or made." So far as mechanics are concerned, this may be accepted as accurate, but, of course, it is the respondent's position that the sale and distribution, just like everything else that was done, was part of a fraudulent scheme, and, therefore, tainted with the same fraud.

So far as the case is concerned, it obviously presents a "violation of rules of fair play and good conscience" (*Pepper* v. *Litton*, 308 U. S. 295, 310).

## ARGUMENT.

### I.

*The Decision of the Court Below in the First Case Cannot Possibly Be Deemed a Holding that the Majority's Proposed Action Was Not Fraudulent.*

It may be doubted that anything need be added to the opinion in the first case to demonstrate the unsoundness of the proposition advanced by petitioner under Point I of its argument.

The premise of petitioner's argument here (pet. p. 13) is that the court below "*necessarily* decided that the contemplated dissolution and sale were not fraudulent or improper." It should be noted that petitioner is utterly unable to point to the passage of the opinion where the court so held. The simple fact is the court plainly said that until the contemplated action was taken, there were no facts before the court to serve as a basis for a finding of fraud. By the same token, there was no basis for a finding that there was no fraud.

The court made it very clear that it was considering *only* the question whether it should enjoin the holding of a projected corporate meeting. In answering that question the court said:

> 'There has *as yet* been no disposition of the assets or loss to the minority. We cannot say that there will be any such loss. *Thus far* the majority, though it has admitted its motives, *has done only* that which the statute permits it to do, call a meeting for dissolution. *This* it has a legal right to do. It *may* proceed to a dissolution, but what will happen *then* or *thereafter* is *not now* before the court, and cannot *now* be made the basis for a finding of fraud" (82 Fed. (2d) 351, 354, italics supplied).

In other words, the court said plainly that whatever the *plan* of the majority stockholders might be, the facts that would result from its consummation were not then before the court and could not be made a basis for a finding of fraud. But the motive was clearly characterized when the court said:

> "We would be more favorably impressed by the protestations of good faith of appellee's officers had they in their capacity of representatives of the dominant company shown a willingness to submit to arbitration the value of appellants' minority stock. The majority stockholder may believe that it is entirely fair, but its position renders impartiality difficult, for it is compelled to say, 'Let not thy right hand know what thy left hand doth.' In view of the frankly admitted desire of the majority to acquire the stock of the minority, its frank confession that the payments of profits to the minority brings only chagrin and dissatisfaction to the majority, the threat that, unless the minority will sell to it at its own price, it will force dissolution and liquidation of assets and thus produce an opportunity to purchase at a satisfactorily low market price all the physical assets, we confess to some doubt as to eventual results. That degree of fairness required of parties in a dominant situation, or of fiduciary representatives of corporations, or of majority stockholders to the minority, making legal duress impossible, must be present before a court of equity may rest quiescent." (82 Fed. (2d) 351, 355.)

Beyond that, the court in its first opinion clearly forecast the conclusion in the second. It was announced that the majority (the petitioner) stood in the position of a fiduciary to the minority (respondents) and was subject to "the burden of the utmost of scrupulous fair dealing" with that minority; that the majority may not force a sale to itself at less than full value; that the minority must receive its pro rata share of the revenue or property *and* the fruits of the capital investment"; that the price of $700 per share offered by the majority to the stockholders was inadequate

because it was based on asset value alone, and did not consider the earnings record; and that the result of the contemplated plan of dissolution and sale would mean that the petitioner would become the owner of all the profits flowing from the Steamship Company's transportation business.

Put otherwise, the court clearly indicated that the proposed plan would result in an appropriation by the petitioner as majority stockholder of all of the assets of and profits from the Steamship Company's business without paying therefor, a clear breach of petitioner's fiduciary obligation.

Petitioner's misunderstanding of the opinion below is nowhere more clearly demonstrated than in the following sentence (pet. p. 6): "It is highly significant to note that in the extensive *obiter dicta* indulged in by the Circuit Court of Appeals in its opinion, deciding to affirm the lower court, it did not indicate that if the dissolution and sale were carried out as proposed, it would hold the same to be a fraud."

Of course, it was no part of the court's function to act as counsel to the petitioner, and there was no burden upon it to advise petitioner what the court would decide if the proposed fraudulent plan was carried out. And yet, the simple application of the principles announced in the first case made the answer clear.

Typical of petitioner's argument is the following sentence on page 14: "It is merely because the court attempted to qualify its affirmance, as noted above, that respondents contend that the two decisions are not in conflict."

A fair reading of the opinion makes it clear that the court did not merely attempt to qualify its affirmance. It very adequately and clearly qualified it. Furthermore, it is not only the respondents who contend that the two decisions are not in conflict. It so happened that both appeals

were heard by the same three judges of the Circuit Court of Appeals, and each opinion was written by the same judge. Before the decision of the second case petitioner argued extensively that the first decision was *res adjudicata*. It again argued this point on the petition for rehearing. In the face of this construction of their own decision by the same court, it seems quite unnecessary that respondents should have to contend that there is no conflict.

We do, of course, believe that to be the true interpretation of the opinions and, as we have suggested before, the opinions themselves abundantly demonstrate this to be so. It may be, as petitioner says on page 15, that the court might have enjoined the projected offer. As events have turned out, it would, perhaps, have been a good thing if it had done so. But it hardly lies in the petitioner's mouth to complain of this nice balancing of a purely discretionary matter, when the result in the first case was exactly what petitioner then urged upon the court.

Nor is it fair for petitioner to refer to the first opinion as though it were merely affirmed "without prejudice." Every question, except the right of the majority to call a meeting, was carefully preserved for future consideration. The court said:

> *"But this affirmance and the dismissal by the court below will be without prejudice to the right of appellants hereafter to present the facts herein presented in connection with such further facts, if any, as bring about a situation within the doctrine recognizing causes of action in minority stockholders"*. (82 Fed. (2d) 351, 356).

It was clearly within the power of the court below to reserve the questions that it thus reserved. Its ultimate conclusion upon those questions is the only decision possible in view of the principles announced in the first case.

## II.

### *There Is No Conflict With the First Circuit Case of May* v. *Midwest Refining Co.*

It must be first noted here that it is scarcely accurate for petitioner to say that the Circuit Court of Appeals has held that petitioner defrauded respondents merely because it purchased the ships at the dissolution sale. As the court said: "The business was not discontinued; defendant took over the boats, it continued to operate them, it continued to devote them to the same transportation that they had always carried on—the only difference being that now the latter realizes all the profit which results from such transportation and the minority stockholders get none of it" 125 Fed. (2d) 369, 373.

In view of the court's finding that the respondents' stock was worth more than $700 per share, and the admitted fact that respondents did not receive even that much out of the proceeds of the sale, it is patent that the consideration paid by petitioner was inadequate. This was an essential ground of the decision below. In *May* v. *Midwest Refining Co.*, 121 Fed. (2d) 431, at page 438, the court itself noted that "we have before us no allegation of inadequacy of consideration." It is impossible to find any conflict between two decisions when the ground upon which one is predicated was not even an issue in the other.

## III.

### *There Is No Conflict With the West Virginia Decisions.*

It should be noted that under this third subdivision petitioner would forget that it is trying to justify its conduct as a trustee. It seems to think that such justification can be found in the alleged absolute right of a stockholder in a

West Virginia corporation to vote in his own interest, even against the interest of the minority. The ready admission that petitioner's action may be justified upon this basis provides by itself an adequate answer to the petition.

The West Virginia statute upon which petitioner relies authorizes a 60% majority stockholder to *discontinue the business* of a corporation. Petitioner did not discontinue but appropriated the business of the Steamship Company, and the court so found. There is no law in West Virginia or elsewhere that gives sanction to such an appropriation at the expense of the minority stockholders.

The very case cited by petitioner (*Thurmond* v. *Paragon Colliery Co.*, 82 W. Va. 49, 95 S. E. 816) is relied upon by the court below, and establishes that a majority stockholders' vote "must not be so antagonistic to the corporation as a whole as to indicate that their interests are wholly outside of the interest of the corporation *and destructive of the interests of the minority stockholders.*" (See 125 Fed. (2d) at page 374.)

The other West Virginia case referred to, *Tierney* v. *United Pocahontas Coal Co.*, 85 W. Va. 545, 102 S. E. 249, points out in the very passage quoted that the transaction must be entirely fair and must prejudice the rights of *no* interested party. The court said, further: "In a case like this, where the purchaser of the property is also in effect the seller, the utmost good faith is required" (102 S. E. at p. 255) and held that the minority was not bound by the sale which was held to be at an inadequate price.

The nub of the matter is demonstrated in petitioner's discussion of this court's opinion in *Pepper* v. *Litton*, 208 U. S. 295. It is asserted that the court below relies upon this decision as authority for the proposition that it is *ipso facto* a breach of trust for a parent corporation to vote for the dissolution of its subsidiary, against the interests of the minority stockholders thereof, and to purchase the sub-

sidiary's physical assets for a full fair price and use them in its business.

*Pepper* v. *Litton* stands for the ordinary principles of fair play. It was not relied on by the court below as authority for the proposition as stated by petitioner, nor does that proposition correctly represent the decision in this case.

The court below decided that petitioner set out to acquire the assets and business of the Steamship Company, and that it did acquire such assets and business without paying therefor. Liability attaches to petitioner in such a case as surely under the principles of *Pepper* v. *Litton* as under the many decisions representing the weight of authority and relied on by the court below in its two opinions.

## IV.

### *The Court Below Properly Laid Down the Rule to Be Used in Determining Respondents' Damages.*

It seems unnecessary to add to what has already been said with respect to petitioner's complaint under its fourth point. Certainly, it is sufficient to say that the question of injury to the plaintiffs was inherent in the case. Petitioner recognized this, for it introduced evidence upon the question of the value of respondents' stock (R. 60, 67). It submitted findings thereon to the District Court (R. 226, 227); it was the subject of assignment of error (R. 233, 234), and it was argued in the briefs.

By announcing the rule to be applied in ascertaining the amount of respondents' damages, the court below avoided the possibility of yet another appeal after the taking of evidence upon this question. It is impossible to see any sound basis for criticism of the court's obviously correct conclusion upon this point.

## Conclusion.

In conclusion it is respectfully submitted that the petition presents neither grounds nor reason for granting the writ prayed for.

Respectfully submitted,

Silas H. Strawn,
Frank H. Towner,
Arthur D. Welton, Jr.,
*Counsel for Respondents.*

APPENDIX.

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# In the United States Circuit Court of Appeals For the Seventh Circuit

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**No. 7578.** **October Term and Session, 1941.**

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FOREMAN M. LEBOLD and SAMUEL N. LEBOLD,
*Plaintiffs-Appellants,*

*vs.*

INLAND STEEL COMPANY,
a Corporation,
*Defendant-Appellee.*

} Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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**December 29, 1941.**

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Before EVANS, SPARKS, *Circuit Judges,* and LINDLEY, *District Judge.*

LINDLEY, *District Judge.* Plaintiffs, minority stockholders of the Inland Steamship Company, brought suit in the District Court to recover damages claimed to have been incurred by them by reason of alleged fraudulent acts of defendant Inland Steel Company in dissolving the Steamship Company, buying its assets and appropriating its business. The theory of plaintiffs was that defendant, owning some 80 per cent of the stock of the Steamship Company, had so utilized its dominant position as majority stockholder as to force the latter company out of a prosperous going business, to bring about its dissolution and to take over its property and its business to the detriment of plaintiffs. The court dismissed the complaint and this appeal followed.

The events preceding the dissolution and sale were be-

fore us in *Lebold* v. *Inland Steamship Co.*, 82 F. (2d) 351. There a bill to enjoin dissolution had been dismissed by the District Court. Upon appeal we held the complaint premature and affirmed the dismissal, without prejudice, however, to the right of plaintiffs to apply for relief if developments thereafter, coupled with what had already happened, should justify such action. Neither the facts there involved nor the law there announced need repetition.

In addition to the facts presented in that record, we have here evidence of events subsequent to that decision. Throughout the duration of the litigation involved in the prior decision, the business of the Steamship Company continued without interruption or change. The operations for the year 1935, which were not in the prior record, were successful, as had been those of all earlier years, and on December 19, 1935 the directors authorized an annual dividend of $150 per share. The decision was announced on March 18, 1936. Eight days thereafter, notice of a special meeting of stockholders was given, to be held April 2, 1936, for the purpose of dissolution. Mr. P. D. Block, president of the Steamship Company and of the Steel Company presided. Others present were L. E. Block, a director of both corporations, Randall, vice-president, director and manager of the transportation business of the Steamship Company and also vice-president and director of the Steel Company, E. L. Ryerson, Jr., director of both companies, Morris, employee of the Steel Company and secretary of the Steamship Company, Truesdale of the Steel Company and Mullen and plaintiffs, minority stockholders, and counsel for the Inland Steel Company. Over the negative vote of the minority stockholders, a resolution was adopted directing dissolution of the Steamship Company. Block stated that the reason for such action had been submitted before and that he saw no good reason for "rehashing" it. One of plaintiffs asked Randall whether the Steamship Company had been given opportunity to bid for the Steel Company freight traffic or whether, as a director of the Steamship Company, he had made an effort to get the traffic on a competitive basis with other bids received. Randall replied that he had been instructed by President Block that "under no circumstances" did he, Block, wish to transact any business with the Steamship Company. Plaintiffs requested that the minutes reflect the fact that the Steamship Company had been given no opportunity to bid on carrying freight for the Steel Company. Block observed that the meeting was a Steamship Company meeting and not one of the Steel

Company and that "they were not obligated to give any information concerning" the latter. Randall went so far as to say that but for his courtesy, he would not have replied to the question. At the trial Randall testified that he had made no effort to secure traffic for the Steamship Company from any sources other than from the Steel Company because that company had kept the Steamship Company's boats busy during 1934 and 1935. He said further that when he became "certain of dissolution," he made no effort to get traffic for the Steamship Company on the theory that it might be able to continue in business. Later a directors' meeting was held on April 14, 1936, attended by the Blocks, Randall and Foreman Lebold. The latter did not vote. The directors authorized a sale of all assets on May 1. At that time the Steel Company bid in the three boats owned by the Steamship Company at $1,120,000, apparently their fair value. There were no other bidders. Defendant immediately took over the boats. It continued the transportation business formerly conducted by the Steamship Company and has carried it on without interruption or change, continuously, ever since.

The master found that plaintiffs were entitled only to their pro rata share of the proceeds of sale of the boats. The court agreed and dismissal followed. Plaintiffs insist that the District Court failed to apprehend the purport of and give effect to this court's decision and to draw from the facts in the record proper legal conclusions.

At the outset, giving consideration to the facts involved in the former proceeding and those presented for the first time, it is well to keep in mind that at all of the stockholders' meetings and directors' meetings involved, the majority stockholder, defendant, was in control. Defendant, owning 80 per cent of the stock, had the power to determine and did determine the actions of the Steamship Company. It is perfectly apparent, indeed, the officers of defendant themselves indicate that their interest was to force dissolution so that they might get rid of the minority interest and take over the assets and business of the Steamship Company. It is only with this elementary indisputable premise in mind that the proper answer to the controversy can be reached.

The directors of a corporation represent it and its stockholders; the majority stockholders of a corporation represent it and its minority stockholders. The vote of every director and of every majority stockholder must be di-

rected to and controlled by the guiding question of what is best for the corporation, for which he is, to all legal intents and purposes, its trustee. In his voting, in his management, he is bound to be wholeheartedly, earnestly and honestly faithful to his corporation and its best interests; his own selfish interests must be ignored. If when he votes he does so against the interest of his company, against the interest of his minority and in favor of his own interest, by such selfish action, by omission of fidelity to his own duty as a trustee, he forfeits approval of his action in a court of equity. When the Blocks and Randall voted in the Steamship Company meeting they were within their statutory right to force a dissolution, but no legislative enactment could endow them with the right as trustee for the minority stockholders to take over for their own, through any legal device, plan or method all assets and all business of the company for which they were fiduciaries, if to do so was clearly and obviously against the best interests of the company and the minority stockholders. Obviously and admittedly these gentlemen were not thinking of the Steamship Company's interest; they were wholly ignoring it. Their sole interest lay in the Steel Company, and, in the words of Randall, it "griped them to see that the minority stockholders were enjoying any profit." Therefore, we must accept the obvious fact, namely, that defendant and its officials, failing to perform their duties as stockholders and directors of the Steamship Company, were faithless to that company and to the minority stockholders. The latter were powerless to help themselves; they rightfully complain of the breach of trust upon the part of defendant resulting in damage.

In *Pepper* v. *Litton*, 308 U. S. 295 at 306, Mr. Justice Douglass, discussing the responsibility of directors and of dominant or controlling stockholders, said: "A director is a fiduciary. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 588. So is a dominant or controlling stockholder or group of stockholders. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 492. Their powers are powers in trust. See *Jackson* v. *Ludeling*, 21 Wall. 616, 624. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 599. The

essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. * * * He who is in such a fiduciary position *cannot serve himself first* and *his cestui second.* He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. * * * He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis." Here the strategic position of defendant was used solely for its own preferment; the affairs of the corporation were "manipulated" to plaintiffs' detriment. Here defendant did "indirectly through the corporation what it could not do directly."

Defendant says it has not appropriated the business of the Steamship Company. The statutes of West Virginia, which control the dissolution proceedings, authorize the majority to dissolve and "discontinue the business of the corporation." Here the business was not discontinued; defendant took over the boats, it continued to operate them, it continued to devote them to same transportation that had always been carried on. The business which had been prosperous for twenty-five years was turned over to defendant. By its strategic position, by its dominant situation, it could and did force a sale, bid in the property itself and thereafter continue to operate the business as before. The Steamship Company had been organized many years before to transport freight for hire; it had transported only the freight of defendant; this it continues to do, the only difference being that now the latter realizes all the profit which results from such transportation and the minority stockholders get none of it.

This transportation business was in no wise the business of the Steel Company. It was the business carried on by the Steamship Company, a business which the defendant

expressly said it was going to put out of existence. In its strategic position of dominance, even though it was trustee for the minority stockholders, defendant warned plaintiffs that if they did not sell their stock, the Steel Company would end all business relations with the Steamship Company and that they must either sell their stock or see the Steamship Company go out of business. That these threats were not idle, that they were made with the ulterior motive, to bring duress to bear and to force plaintiffs, is obvious. The business was never interrupted, never curtailed, never modified but continued without interruption.

What defendant might have accomplished under color of the West Virginia statute was discontinuance of the business. What it did, was to take, through form of a sale, the physical assets and the entire business of the Steamship Company. Whether we stamp the happenings as dissolution or with some other name, equity looks to the essential character and result to determine whether there has been faithlessness and fraud upon the part of the fiduciary. However proper a plan may be legally, a majority stockholder can not, under its color, appropriate a business belonging to a corporation to the detriment of the minority stockholder. The socalled dissolution was a mere device by means of which defendant appropriated for itself the transportation business of the Steamship Company to the detriment of plaintiffs. That the source of this power is found in a statute, supplies no reason for clothing it with a superior sanctity, or vesting it with the attributes of tyranny. *Allied Chemical & Dye Corp.* v. *Steel & Tube Co. of America,* 120 Atl. 486 (Del.). The books are full of instances of disapproval of such action. If it be an absorption by the dominant member of all the returns of the corporate investment, or a sale of the property to oneself for an inadequate consideration, or deprivation by a syndicate formed to freeze out a minority stockholder through sale and dissolution or if the buyer and seller are the same, the right of a stockholder to vote becomes a power in trust when he owns the majority assumes and exercises domination and control over corporate affairs. Such majority stockholders' vote "must not be so antagonistic to the corporation as a whole as to indicate that their interests are wholly outside of the interest of the corporation and destructive of the interests of the minority shareholders." *Thurmond* v. *Paragon Colliery Co.,* 82 W. Va. 49. See also *Jackson* v. *Ludeling,* 88 U. S. 616; *Lebold* v. *Inland Steamship Co.,* 82 F. (2d) 351; *Ervin* v. *Oregon Ry. & Nav. Co.,*

27 Fed. 625; *Wheeler* v. *Abilene Natl. Bank*, 159 Fed. 391; *Lehigh Valley Transit Co.* v. *Janes*, 40 F. (2d) 848; *Jones* v. *Missouri-Edison Electric Co.*, 144 F. 765; *Wheeler & Lake Erie R. R. Co.* v. *Carpenter*, 218 F. 273; *Highway Commissioners* v. *Bloomington*, 253 Ill. 164, 97 N. E. 280; *Dowling* v. *Railroad*, 81 S. E. 313; Rohrlich, "Corporate Control by Minority Stockholders," 81 Pa. Law Review 728.

Furthermore it seems to us that defendant may not be permitted to say that there were no values other than those of physical assets. By taking over the assets and by continuing the prosperous business of its former cestui trust defendant has removed itself from the place where it is permissable for it to contend that there is no prosperous business. That there was value over and above physical assets is perfectly obvious from the fact that a prosperous business existed and is still being conducted; that plaintiffs, if they had not been deprived of their interest, would be still sharing in the returns from that business and that at the present time all the profits of such are being enjoyed by defendant to the total exclusion of plaintiffs.

It follows that the true rule for determination of the value of plaintiffs' interest must be based upon the value not of the physical assets alone but upon all the elements mentioned in our former opinion and in arriving at such value, all those elements, including value as a going concern, must be taken into consideration. In twenty-five years the business of the Steamship Company has never ceased to be a going concern. It has been extremely prosperous. It continues to be so without threat of interruption. In this going concern plaintiffs had an interest.

Fortunately the testimony of the various witnesses of the respective parties is not greatly in controversy when this rule is followed. Plaintiffs produced testimony that, considering the earnings in the past and assuming that the business would continue to be in the future within a reasonable degree what it had been in the past, the shares of stock were worth at least $1500 each. Defendant's witnesses testified that, on the assumption that traffic relationship between the Steamship Company and the Steel Company were severed, the value of the stock would be the value of the ships. One added that if he could assume that the company would continue to earn the same amount as it had earned in the past, the value would be $2500 a share. Another of its witnesses testified that, assuming that defendant could at any time discontinue using these partic-

ular ships, the value of the stock would depend entirely upon the value of the physical assets; that he had given consideration to the past earnings but had allowed nothing on account of them because of his further assumption that defendant would cease giving its business to the Steamship Company and that there would not be other sufficient business available. He said, "I did not use the earning record as an element in fixing the value; I had in mind that the company had been a big earner and yet under the circumstances (his assumptions) could not use that element in fixing value." Another witness testified similarly and upon the same assumptions. He said, however, "I did not consider past earning power and I added nothing to the value because of that factor. I assumed that the Steel Company was not going to give" the Steamship Company any traffic and assumed that the latter had no business and no opportunity to obtain profitable business. Upon this testimony and despite the fact that defendant company has continued at all times to operate the ships as heretofore and that those have carried the same freight as formerly, the master found that defendant had not appropriated anything belonging to plaintiffs as minority stockholders and that the value of such minority interests did not exceed their pro rata shares of the proceeds of sale of the ships. The court approved this finding.

This it appears from both plaintiffs' and defendant's testimony that if the Steamship Company had been considered a going concern and if its business might reasonably be expected to continue, the value of plaintiffs' stock would be in the neighborhood of $2000 uer share.

That the master was misled in his reasoning is apparent from some of his findings. He said "the permitted participation in handsome returns for twenty-five years seems to me a very reasonable limitation for the duration of any such obligation." Obviously this is fallacious. It is not a question of how much profit plaintiffs and defendant have previously enjoyed from ownership of stock in the Steamship Company, but a question of what the existence of the transportation business of that company, which defendant has wrongfully taken, is now fairly worth. Henry Ford could not rightfully say to one of the stockholders who invested in the Ford automobile company in its beginning and whose investment had multiplied thousands of times in value, that in view of the handsome returns he had upon the investment, he must deliver the stock to

Mr. Ford upon receipt of his pro rata share of the value of the physical assets of the Ford Company or Mr. Ford would dissolve the company and bid in the assets and deprive him of any such returns.

After the sale of the physical assets, the proceeds were divided amongst the stockholders of the Steamship Company, each receiving his proportionate share. These were treated as liquidating dividends and as such plaintiffs receipted for them. Defendant now contends that by acceptance of the distributive share of the proceeds of sale of the boats, plaintiffs are estopped to prosecute the present suit.

No estoppel arises upon these facts. Plaintiffs are suing, not to rescind the sale, but to recover a money judgment, alleged to be due them because of their damage incurred by the fraud of defendant. This demand is for something over and above and in addition to plaintiffs' proportionate share of the proceeds of liquidation of physical assets. Estoppel arising only when one has so acted as to mislead another and the one thus misled has relied upon the action of the inducing party to his prejudice. Shortly stated, one may not assume a position inconsistent with a former position to the prejudice of his adversary. *Texas Co.* v. *Gulf Refining Co.*, 26 F. (2d) 394; Pomeroy Equity Jurisprudence, Sec. 804. It is the injury accruing from inducement or silent acquiescence which creates the estoppel. *Augustus* v. *New Amsterdam Casualty Co. of Baltimore*, 100 F. (2d) 581 (CCA2); *Arkansas Natural Gas Corp.* v. *Sartor*, 98 F. (2d) 527 (CCA5); *United States* v. *Scott & Sons*, 69 F. (2d) 728; *Clark* v. *Fisher*, 8 F. (2d) 588. Pomeroy, Equity Jurisprudence, Section 805, says: "The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. * * * He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it."

Plaintiffs did not here remain silent. They brought their suit prematurely and this court affirmed its dismissal because of such prematurity, expressly stating, however, that the dismissal should be without prejudice to plaintiffs to complain if future developments should justify their fears. Defendant had the right under the statute of the

state in which the Steamship Company was incorporated to work a dissolution. Following that it was bound to distribute the proceeds realized pro rata amongst the stockholders, but the receipt of such share in no wise affected the complaint of plaintiffs not that the sale should be rescinded but that in prosecuting the legal procedure of dissolution defendant had over-reached plaintiffs and damaged them. Their demand for damages was not involved at all in their receipt of the pro rata shares of the proceeds of sale of the Steamship Company's boats. Plaintiffs did not acquiesce in or consent to perpetration of a fraud against them. Defendant has not been misled; it has not relied, to its injury or prejudice, upon any acquiescence or inducement on the part of plaintiffs.

Upon the record defendant is liable to plaintiffs. The damages to be allowed are the difference between what plaintiffs have received from the sale of the physical assets and what the stock was really worth as stock in a going prosperous concern continuing in business. Upon that rule the trial court will fix plaintiffs' damages.

The judgment is reversed for action by the District Court consistent with this opinion.

A true Copy:

Teste:

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*Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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37

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

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## No. 1057

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INLAND STEEL COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD,
*Respondents.*

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**REPLY OF PETITIONER IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

---

CARL MEYER,
FREDERIC BURNHAM,
HERBERT A. FRIEDLICH,
*Counsel for Petitioner.*

THE DONNELLEY-GARBER PRINTING COMPANY, 350 WEST ADAMS, CHICAGO

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

## No. 1057

INLAND STEEL COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD,
*Respondents.*

## REPLY OF PETITIONER IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

### I.

### THE CONFLICT BETWEEN THE TWO DECISIONS OF THE SEVENTH CIRCUIT COURT OF APPEALS.

Petitioner respectfully insists that the first decision directed that it might proceed with its planned dissolution and that the second decision held that it had committed a fraudulent breach of trust in so doing.

It is self-evident that if a parent corporation cannot dissolve its solvent prosperous subsidiary and purchase its assets at the dissolution sale unless it pays to the minority the value of its interest capitalized on an earning basis, then to all intents and purposes the subsidiary cannot be dissolved at all. Dissolution is liquidation and that is not liquidation. The case at bar is an illustration. Steamship Company was paying about 100% dividends annually.

The second decision holds that, since Steel Company bought the assets at the dissolution sale, it must pay the value of the minority's stock capitalized on an earning basis, or somewhere in the neighborhood of $2000 per share. the equivalent of 20 years dividends of 100%. Undoubtedly, the effect of the decision is to deny the right of the majority to dissolve, if it intends to purchase the assets at the sale.

We submit that the first decision did not even intimate this to be the rule, much less hold it.

Respondents concede that Steel Company clearly and explicitly stated that it planned to dissolve Steamship Company and purchase its ships for $1,120,000 so that it could carry its freight at cost. When respondents attacked the plan in the first case, claiming it was fraudulent, the District Court held (1) that the plan contemplated a *bona fide* dissolution, (2) that the dissolution of the company and sale of the assets as planned would not perpetrate a fraud on the minority, (3) that the dissolution should proceed and the assets be sold to the highest and best bidder, and (4) that Steel Company might bid at the sale (R. 169, 170). The Circuit Court of Appeals affirmed the chancellor; it did not hold those findings erroneous in any respect. On the contrary it held that a majority stockholder may dissolve the corporation regardless of motive or expediency, that such a stockholder is not always a trustee although he may become such because of his conduct, that the majority stockholder can force a sale of the assets to himself for a fair price, that a court of equity may not interfere with the right of the majority to force a dissolution and sale unless the evidence discloses an unfair advantage taken over the minority. Now, in the second decision the Circuit Court of Appeals holds that (1) the consummation of the plan did not accomplish a *bona fide* dissolution, (2) that the plan was fraudulent in purpose and (3) that its accomplish-

ment in a manner exactly as discussed in the first case amounted to a fraudulent breach of trust and a perpetration of a fraud on the minority. It could not have failed to order an injunction in the first case if its view then was that announced in the second case. Therefore, as we stated the first decision *necessarily* approved the dissolution plan.

Respondents necessarily admit that if the dissolution plan was fraudulent the court could have enjoined it in the first case. However, they advance the novel proposition that because the plan had not yet been executed the court could in its discretion refrain from enjoining it but could permit the dissolution to proceed and condemn it after it was consummated.

This seems unconscionable. Certain it is that petitioner did not interpret the decision as a condemnation of the plan. It would not have been so devoid of reason as to have defied the court and proceeded with a plan held fraudulent. The Master did not so interpret the decision. The District Court did not so interpret it.

Respondents state that the court did not hold in its first decision that the Steel Company might proceed. What did the court mean when it said "proceed to a dissolution"? Did it mean "dissolve but do not carry out the rest of the plan because it is fraudulent"? Did it mean "dissolve but do not purchase the ships even at full value because you are a trustee and that would be a breach of trust"?

We submit that when the court stated that the chancellor "rightfully held that the evidence does not make a case within the principles which we have outlined above" that "not all the essentials necessary to a complete case are present. There has as yet been no disposition of the assets or loss to the minority," that "Though the court was justified in its conclusion that the facts thus far do

not amount to fraud it by no means follows that what may develop in the future may not bring about such an injury to appellants as will justify a renewal of their appeal to the chancellor'' the court was not condemning the plan, was not stating that if Steel Company went any farther with its announced purpose it would be guilty of fraud, but was leaving open the door in case fraud occurred in the method or manner of considering the sale and distribution.

When the court stated in the final paragraph:

> ''The court was justified in its conclusion that the presently developed circumstances are not such as to create a cause of action in appellants, and the decree, therefore, should be affirmed. But this affirmance and the dismissal by the court below will be without prejudice to the right of appellants hereafter to present the facts herein presented in connection with such other facts, if any, as bring about a situation within the doctrine recognizing causes of action in minority stockholders.''

the presently developed circumstances there referred to were not only the intention to dissolve, but also the intention to purchase the assets at the dissolution sale for $1,120,000. To what was the court referring when it stated that the minority stockholders could present their case again if other facts developed which gave rise to a cause of action by minority stockholders? It must necessarily have been something other than the then developed circumstances. Respondents must admit that no ''other facts'' than those in contemplation at the beginning, did occur which would give rise to a cause of action by minority stockholders. Respondents cannot deny that the court indicated that a purchase by the majority for a fair price was proper (p. 354). Nor can they deny that the courts only expressed fear was that the majority would ''force dissolution and liquidation of assets and thus produce an opportunity to purchase at a satisfactorily low market price **all the physical assets**'' (p. 355) and that it

was that unwarranted fear that caused the court to invite the minority to return if such a thing occurred.

Respondents cannot contend that the Court in the first decision ruled or intimated that it would be fraudulent for Steel Company to purchase the ships unless it paid going concern value for the minority interest at a liquidation sale, or that purchasing the ships at their full value would constitute appropriating the minority's interest without compensation. Yet in the second decision the court condemns Steel Company simply and solely because it bought the ships. What other act of Steel Company caused it and its officers to be scathingly denounced as violators of sacred trusts and decreed to be mulcted in huge damages? If those assets had been purchased by a third party, the minority would have received exactly what it has now received. If respondents themselves had purchased the ships they would not have paid more than what Steel Company paid. They do not contend that the purchase of the ships by them or by a third party would have entitled them to carry Steel Company's freight.

## II.

### THE CONFLICT BETWEEN CIRCUITS.

In response to petitioner's point that there is a direct conflict between the holding of the court in the First Circuit in the case of *May* v. *Midwest Refining Co.*, 121 Fed. (2d) 431, and the instant case in the Seventh Circuit on the question as to whether a majority stockholder commits a fraudulent breach of trust when it causes the corporation to be dissolved, over the protest of the minority, and purchases the assets for a fair price at the dissolution sale, respondents attempt to avoid the conflict by contending that in *May* v. *Midwest Refining Co.* adequacy of consideration was not involved.

We respectfully submit that adequacy of consideration is not involved in the case at bar. Respondents argue circuitously. They assume their conclusion. If it be assumed that it is entirely right and proper for a majority stockholder to purchase the assets of its subsidiary at a dissolution sale, then Steel Company paid the full fair price for the ships—$1,120,000. If it be assumed that it is wrong for a majority stockholder to make such a purchase, then, according to the Seventh Circuit Court of Appeals, Steel Company should have paid about $3,200,000. It is only upon the assumption of wrongdoing by Steel Company that inadequacy of consideration can be argued. The claimed wrong was the act of purchasing the assets by a majority stockholder whom the court regarded as a trustee. However, *May* v. *Midwest Refining Co.* holds that such a purchase is not a fraudulent breach of trust, even though the majority stockholder be regarded as a trustee. If that case is followed, the right to purchase is established, and no claim of inadequacy of consideration is possible. The legality of the act of purchase establishes the adequacy of consideration. If the lower court in the instant case is followed, then it was a fraudulent breach of trust for Steel Company to buy the ships. Both decisions cannot be right.

Naturally, respondents are reluctant to concede that the lower court found that a fraud had been committed merely because the majority purchased the ships, but that is very clear. Suppose respondents themselves had purchased the ships, would they have had to pay more than physical asset value for them? Suppose a third party had been the purchaser? Unless respondents wish to contend that a purchase of the ships by Steel Company was fraudulent if it used them, but not fraudulent if it permitted them to disintegrate from non-use, they must concede that the act of purchasing is the only basis for the lower court's holding that the transaction was fraudulent.

Respondents attempt to avoid this result by contending that Steel Company obtained more than the ships; that in the process of purchasing the ships it appropriated Steamship Company's business. That also is obviously incorrect. At the dissolution sale the ships were Steamship Company's only saleable assets. If respondents themselves had purchased the ships, or if some third party had been the purchaser, neither would have had the disposition of Steel Company's traffic. Steel Company would not have been required to employ those ships for the transportation of its freight. That is the crux of this case and the point which the lower court persistently ignored.

No right to carry Steel Company's freight inhered in the ships, nor passed with the ships to the purchaser, because *there was no contractual relationship of any kind between Steel Company and Steamship Company with reference to the carriage of Steel Company's freight.* Respondents have realized the importance of this, and have attempted to avoid it by asserting, at page 5, that it is a misstatement. On the contrary, those are the words of the stipulation between the parties. (R. 194.) The lower court did not, and in view of the stipulation could not, have found differently. The court stated that "there was no express contract between the two companies, but the tonnage was carried by original arrangement, succeeded by tacit understanding, at the going market rates." The plain meaning of those words is that although Steel Company was not bound to transport its freight via Steamship Company, nor Steamship Company bound to carry such freight, it was at first arranged, and later tacitly understood, that going rates would apply to the freight which was carried. Respondents' anxiety to have those words interpreted as a holding that Steel Company was obligated to ship its freight via Steamship Company and not merely to pay the going rate for what it did ship, indicates that respondents fully understand that adequacy of consideration is not here involved,

because Steel Company's freight business did not follow the ships. If Steel Company had an obligation, express or implied, to give its freight to the ships, no matter who was the purchaser, the court would have said so, and would have held that the District Court was in error in holding as a matter of law that there was no such obligation and no such valuable saleable assets. (R. 226, 229.) Since no conceivable purchaser could have obtained more than the ships, and since the ships brought their full value, adequacy of consideration is not involved. That point being the only one urged in support of the claim that the case in the First Circuit and the case at bar do not conflict, we respectfully submit that the direct conflict between the controlling principles in those two cases is demonstrated.

## III.

### THE CONFLICT WITH THE WEST VIRGINIA DECISIONS.

Respondents state that petitioner would forget that it is trying to justify its conduct as a trustee. Petitioner does not forget that, but would ascertain the rights of a majority stockholder (parent corporation) of a West Virginia eighty per cent owned subsidiary with reference to the dissolution of such subsidiary. Has such stockholder an absolute right to vote dissolution, *regardless of motive and expediency?* The lower court, in its first decision, held that to be the meaning of the West Virginia statute. If the subsidiary is prosperous and paying dividends, dissolution would stop those dividends, and would naturally be detrimental to the minority. If the subsidiary is a mere incident in the business of the majority stockholder (parent corporation) and the dividends paid to the minority are merely an added operation cost to the parent corporation, the cessation of dividends would be a definite benefit to the latter. Does the fact of such damage to the minority and benefit to the majority prevent the

majority from dissolving the subsidiary? If so, how can a parent corporation ever lawfully dissolve its prosperous going subsidiary over an objecting minority? What becomes of the West Virginia statute? What becomes of the numerous other similar statutes? Can minorities hereafter block reorganization of solvent corporations as they formerly could at common law?

The answer of the Seventh Circuit Court of Appeals to these important questions of local and general corporation law is that the vote of every majority stockholder must be controlled by the guiding question of what is best for the corporation and the minority stockholders, for which he is trustee; that his own selfish interest must be ignored; that when he votes against the interest of the minority and in favor of his own interest, he commits a breach of trust, is faithless to the minority, and merits the condemnation of a court of equity (R. 253). This means that a parent corporation, being a majority stockholder and hence a trustee for the minority, cannot vote in his own interest to dissolve its prosperous subsidiary since dissolution would damage the minority stockholders of the subsidiary. It is not appropriate to argue the merits now except as they bear on questions presented as grounds for granting the writ, but neither the cases cited by respondents nor any other cases so hold, in the face of a permissive statute such as that of West Virginia, where the stockholders' vote is controlling. The important point now is that the Supreme Court of West Virginia, in *Thurmond* v. *Paragon Colliery Co.*, 82 W. Va. 49, 53, 95 S. E. 816, 817, holds that in meetings of shareholders, each shareholder represents himself and his own interests solely, and in no sense acts as a trustee or representative of others. That is the law everywhere. Otherwise the majority could never vote, if its vote detrimentally affected the minority. As respondents indicate (Reply, p. 12), the vote cannot be destructive of the interests of the minority,

but the interests of the minority are merely their proportionate share in liquidation. They have no right to keep the corporation alive, or if it is dissolved, to obtain the going concern value of their interest. The cases hold that the statute which permits the majority to control is a part of their contract with the corporations.

Naturally, if by the dissolution vote the majority assumes control, it becomes a trustee, and must scrupulously protect the minority interest, and accord them ratable distribution of the proceeds of the dissolution sale. That is where the fraud occurred in *Southern Pacific* v. *Bogert*, 250 U. S. 483, and *Jones* v. *Missouri Edison Electric Co.*, 144 F. 765 (8 C. C. A.), cited by respondents and by the court in each of its opinions. It was not in the assumption of control, which was held proper, but in the distribution, which ignored the rights of the minority to their ratable share.

Not only does the Supreme Court of West Virginia hold that stockholders may vote in their own interest and against the interest of other stockholders, but in *Tierney* v. *United Pocahontas Coal Co.*, 85 W. Va. 545, 559, 102 S. E. 249, 255, holds that a majority stockholder may buy the corporate assets for a fair price. Here again we have the West Virginia law, as laid down by the Supreme Court of that State, directly in conflict with the Seventh Circuit, which has held it to be a fraudulent breach of trust for the majority stockholder, a parent corporation, to purchase its subsidiary's assets at the dissolution sale. As to the *Tierney* case, respondents indicate that the purchase price must be adequate. They do not deny that the West Virginia court holds that the majority has a right to purchase. If the Seventh Circuit Court of Appeals had conceded that, their decision would have been for petitioner, Steel Company, because if they had so held they could not have ruled that Steel Company should pay twenty times par for the minority interest, or the equivalent of 100 per

cent dividends per annum for twenty years. This is merely a denial of the right of dissolution. This is not fair play. This is not what *Pepper* v. *Litton* stands for, but we respectfully submit it is what the Seventh Circuit Court of Appeals insists *Pepper* v. *Litton* stands for. If not, why did the court cite it and quote at length therefrom?

## IV.

### THE QUESTION OF DAMAGES.

What is the value of the business of the transportation company whose only customer is its majority stockholder, which uses the company to carry its freight, when that customer is not bound in any way to continue its business relations with the company, and does not intend to do so, but, on the contrary, intends to, and does, dissolve the company.

The only testimony bearing on this question was uncontroverted and was to the effect that the value of such a business is nothing more than the liquidating value of its physical assets (R. 60-70). Would anyone purchasing the business have paid more than that under the circumstances?

The question was before the court only illustratively and not as a true question of damages, because respondents' bill was dismissed for want of equity. In spite of that, the Seventh Circuit Court of Appeals has now decided the question and has done so in a manner that is obviously erroneous. It has treated the question just as though the corporation could not be dissolved and as though respondent's stock therein had been converted by Steel Company to its own use. Nothing can more clearly illustrate what has happened in this case. The court having held in the first case that the corporation could be dissolved, regardless of motive and expediency, now, in the second case, predicates fraud upon motives only, and in effect holds that the corporation cannot be dissolved at all.

However, the true point, as stated before, is that the court ruled on an issue not yet before it which petitioner respectfully submits it should be permitted to argue before the proper tribunal.

Respectfully submitted,

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